

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

9 JOHNNY LEE JONES, III,)
10 Petitioner,) 3:09-cv-00752-LRH-RAM
11 vs.) **ORDER**
12 GREG SMITH, *et al.*,)
13 Respondents.) /

15 This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254,
16 by a Nevada state prisoner. Before the Court are respondents' motion to dismiss (ECF No. 17),
17 petitioner's motion to amend the petition (ECF No. 23), petitioner's motion for an evidentiary
18 hearing (ECF No. 25), petitioner's motion for an extension (ECF No. 27), and petitioner's motion to
19 expedite (ECF No. 28).

20 || I. Procedural History

21 On November 11, 2005, the Eighth Judicial District Court of the State of Nevada entered a
22 judgment of conviction, pursuant to a jury verdict, convicting petitioner of one count of conspiracy
23 to commit robbery, three counts of burglary, and three counts of robbery. (Exhibit 21).¹ Petitioner
24 filed an appeal on January 26, 2006. (Exhibit 22). On March 7, 2006, the Nevada Supreme Court
25 issued an order dismissing petitioner's appeal as untimely. (Exhibit 24).

¹ The exhibits referenced in this order are found in the Court's record at ECF No. 18-19.

1 Petitioner filed a post-conviction habeas petition in state court on January 22, 2007. (Exhibit
 2 29). Petitioner claimed that his counsel promised to file a direct appeal on his behalf after the
 3 sentencing hearing, but counsel never filed the direct appeal. (Exhibit 29). The state district court
 4 filed an order denying the petition on April 18, 2007, without conducting an evidentiary hearing.
 5 (Exhibit 31). Petitioner appealed. (Exhibit 33). On November 8, 2007, the Nevada Supreme Court
 6 entered an order affirming in part, and reversing in part. (Exhibit 35). Based on petitioner's claim
 7 that he expressed a desire to appeal but his counsel did not file a notice of appeal on his behalf, the
 8 Nevada Supreme Court remanded the case to state district court for an evidentiary hearing. (*Id.*).

9 On January 10 and January 31, 2008, the state district court held evidentiary hearings on
 10 petitioner's state post-conviction petition. (Exhibits 38 & 39). On November 7, 2008, the state
 11 district court entered findings of fact, conclusions of law, and order denying the state petition.
 12 (Exhibit 51). Petitioner appealed. (Exhibit 55). On May 27, 2009, the Nevada Supreme Court
 13 reversed the state district court's denial of the petition. (Exhibit 60). The Nevada Supreme Court's
 14 order states: "We reverse the denial of this claim, and we remand the matter for the appointment of
 15 counsel to assist petitioner in the filing a post-conviction petition raising all direct appeal issues
 16 pursuant to the remedy in Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994)." (Exhibit 60, at p.
 17 5).

18 Petitioner was appointed attorney Martin W. Hart to represent him for further post-
 19 conviction proceedings. On August 24, 2009, petitioner wrote a letter that threatened Martin Hart's
 20 assistant. (Exhibit 62, at Exhibit 1). On August 26, 2009, Martin Hart moved to withdraw as
 21 petitioner's counsel. (Exhibit 62).

22 On November 16, 2009, petitioner filed a petition for a writ of mandamus with the Nevada
 23 Supreme Court. (Exhibit 68). Petitioner raised these issues: (1) His attorney had not contacted him
 24 and had not filed on his behalf; and (2) the *Lozada* remedy he received was inadequate. (*Id.*). On
 25 January 8, 2010, the Nevada Supreme Court issued an order denying the petition for writ of
 26 mandamus, and ruling as follows:

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We have reviewed the documents before this court, and without deciding upon the merits of any claims, we conclude that this court's intervention is not warranted at this time. See NRS 34.160; NRS 34.170. According to the district court's minutes, a hearing has been set for January 7, 2010, on appellant's motion for withdrawal of attorney. Further, petitioner has not demonstrated that he is entitled to a copy of transcripts at state expense.

(Exhibit 70). Post-conviction proceedings, pursuant to the *Lozada* remedy granted by the Nevada Supreme Court, are currently proceeding in state district court. On December 6, 2009, petitioner dispatched his federal habeas petition to this Court. (ECF No. 6, at p. 1).

II. Discussion

In the federal petition, filed December 16, 2009, petitioner claims: "I allege that my state court conviction and/or sentence are unconstitutional because I am only allowed to file a post-conviction petition and [was] not granted a new direct appeal. The remedy I received was inadequate." (Docket #6, at p. 3). Petitioner has filed a motion to amend the petition, with an attached amended petition. (Docket #23). In the amended petition, petitioner asserts two claims regarding the same operative facts asserted in the original petition: an ineffective assistance of counsel claim and a claim of due process and equal protection violation. (Docket #23). Petitioner's motion to amend the petition is denied, as amendment would be futile. Petitioner's claims are not exhausted, as post-conviction state court proceedings are still pending.

A petitioner must first present his grounds for relief to a state court before a federal court may review the merits of the issues he raises. A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims before he presents those claims in a federal habeas petition. *See Picard v. Conner*, 404 U.S. 270, 275-76 (1971); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has given the highest available state court the opportunity to consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,

1 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981). In the
 2 instant case, post-conviction proceedings, pursuant to the *Lozada* remedy, are currently proceeding
 3 in state district court. Because petitioner has not exhausted his grounds for relief in state court, this
 4 action shall be dismissed.

5 **III. Certificate of Appealability**

6 In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28
 7 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
 8 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
 9 petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a
 10 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
 11 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court's
 12 assessment of the constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at 484).
 13 In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues
 14 are debatable among jurists of reason; that a court could resolve the issues differently; or that the
 15 questions are adequate to deserve encouragement to proceed further. *Id.* This Court has considered
 16 the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a
 17 certificate of appealability, and determines that none meet that standard. The Court will therefore
 18 deny petitioner a certificate of appealability.

19 **IV. Conclusion**

20 **IT IS THEREFORE ORDERED** that petitioner's motion to amend the petition (ECF No.
 21 23) is **DENIED**.

22 **IT IS FURTHER ORDERED** that petitioner's motion for an evidentiary hearing (ECF No.
 23 25), petitioner's motion for an extension (ECF No. 27), and petitioner's motion to expedite (ECF
 24 No. 28) are **DENIED**.

25 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (ECF No. 17) is
 26 **GRANTED**.

1 **IT IS FURTHER ORDERED** that the petition is **DISMISSED WITHOUT PREJUDICE**
2 **AS UNEXHAUSTED.**

3 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
4 **APPEALABILITY.**

5 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
6 **ACCORDINGLY.**

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8 Dated this 5th day of February, 2011.
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LARRY R. HICKS
12 UNITED STATES DISTRICT JUDGE
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